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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. PLUS MONEY, INC. and MATTHEW LA MADRID, Defendants, THE PREMIUM RETURN FUND LIMITED-LIABILITY LIMITED PARTNERSHIP, ET AL., Relief Defendants.	Case No. 3:08cv-0764 BEN (NLS) **OPPOSITION OF STEPHEN, J. DONELL, RECEIVER, TO DEFENDANT MATTHEW LA MADRID'S MOTION TO STAY CIVIL PROCEEDINGS PENDING RESOLUTION OF CRIMINAL ACTION** Date: August 11, 2008 Time: 10:30 a.m. Ctrm: 3

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Stephen J. Donell (the "Receiver"), the court-appointed Permanent Receiver for Defendant Plus Money, Inc. and Relief Defendants The Premium Return Fund Limited-Liability Limited Partnership, The Premium Return Fund II Limited-Liability Limited Partnership, The Premium Return Fund III Limited-Liability Limited Partnership, Return Fund, LLC, Return Fund II, LLC, Return Fund III, LLC, Return Fund IV, LLC, Return Fund V, LLC, Return Fund VI, LLC, and their subsidiaries and affiliates (collectively with Plus Money, Inc., the "Receivership Entities") hereby opposes Defendant Matthew La Madrid's ("La Madrid" or "Defendant") Motion to Stay Civil Proceedings Pending Resolution of Criminal Action (Defendant's "Motion") to the extent a stay is sought with respect to any of the rights, powers, or duties of the Receiver. Defendant apparently seeks to stay the entirety of the above-captioned action until such time as criminal proceedings against Defendant – which do not yet exist – are concluded, despite the fact that the Motion is devoid of any basis for staying the rights, powers or duties of the Receiver. Furthermore, a stay affecting the Receiver represents an untimely attempt – by a consenting party – to reconsider the orders of this Court as regards the appointment of the Receiver. For the foregoing reasons, the Receiver respectfully requests that the Court deny Defendant's Motion, at least to the extent it seeks to stay any of the rights, powers, or duties of the Receiver.

I. INTRODUCTION AND RELEVANT FACTUAL BACKGROUND.

The above-captioned action was commenced on April 28, 2008 when the United States Securities and Exchange Commission (the "Commission") filed its Complaint against La Madrid and other defendants and relief defendants. On May 16, 2008, this Court entered its Preliminary Injunction and Order: (1) Freezing Assets; (2) Appointing a Permanent Receiver; (3) Requiring Accountings; and (4) Prohibiting the Destruction of Documents (the "Appointment Order"), pursuant to which the Receiver was appointed as a permanent receiver and charged with, among other things, assuming control over the Receivership Entities and their assets, performing an accounting of the assets and financial condition of the Receivership Entities, investigating, locating, and recovering any outstanding Receivership Entity assets, preparing reports for the Court, and preparing an appropriate claim allowance and investor/creditor distribution plan. La Madrid consented to the appointment of the Receiver and consented to the Court's entry of the Appointment Order in its entirety.

Immediately upon the entry of the Appointment Order, the Receiver assumed control over the Receivership Entities, and commenced his efforts to recover the business and financial records of the Receivership Entities, and to account for and assume control over all assets of the

Receivership Entities. (*See* Declaration of Stephen J. Donell (hereinafter "Donell Decl.) ¶ 3.) As of the date of this Opposition, the Receiver and his professionals (including his accountants and counsel) have recovered numerous computers used by the Receivership Entities, recovered and reviewed Receivership Entity documents and financial records, served multiple subpoenas upon persons or entities in possession of additional Receivership Entity documents and records, and begun the recovery of Receivership Entity assets, including funds held by non-party financial institutions. (Donell Decl. ¶ 4.) The Receiver's efforts are ongoing and incomplete, and significant additional work is required. (*Id.)*

On July 7, 2008, Defendant filed his Motion, requesting that the Court stay the entirety of the above-captioned action pending the resolution of potential – but as yet nonexistent – criminal claims against him. As of the date of this Opposition, no criminal charges have been filed against Defendant in connection with the above-captioned matter. Defendant's Motion is seemingly directed only at the Commission as a plaintiff and himself as a defendant. It does not address the receivership aspects of this case in any fashion, and none of its arguments are directed at the Receiver or the Appointment Order.

On July 10, 2008, the Receiver's counsel contacted Defendant's counsel, requesting that Defendant confirm that his Motion sought to stay only the prosecution of the above-captioned action against La Madrid, personally, and did not seek to stay the receivership aspects of this case. (*See* Declaration of Joshua A. del Castillo (hereinafter "del Castillo Decl.") ¶ 2, Ex. 1.) Defendant and his counsel failed to provide such a confirmation, responding instead that the scope of the stay was for the Court to decide. (del Castillo Decl. ¶ 3, Ex. 2.)

Defendant's Motion fails to discuss, in any way, the receivership aspects of this case. As a result, and out of an abundance of caution, the Receiver hereby opposes Defendant's Motion. Defendant seeks to stay – apparently – the entirety of this proceeding[1] based upon the potential that he may face criminal charges stemming from the same conduct underlying this case, and that – if and when those charges are brought – he may have to choose between testifying in one action

[1] The Receiver respectfully submits that Defendant's failure to confirm that his Motion seeks to stay only the prosecution of the above-captioned action against him, personally, and not the entirety of this proceeding, reflects his amenability to a blanket stay.

and exercising his right against self incrimination in another. Put simply, the possibility that Defendant's exercise of his Fifth Amendment right may become an issue at some unspecified time in the future is an insufficient basis for him to request that the receivership aspects of this case be stayed.

The Receiver's charge is such that it cannot be readily and indefinitely suspended without seriously compromising the results of his efforts, and the ultimate distribution of funds to investors or creditors. The Receiver's work – assuming control over the Receivership Entities; performing an accounting; investigating, locating, and recovering outstanding Receivership Entity assets; preparing reports for the Court; and preparing claim allowance and distribution plans – is time-sensitive, and any delay resulting from a stay affects the ability of the Receiver to effectively carry out his responsibilities and would impact his ability to recover funds and make distributions to investors and creditors. A stay of this proceeding is completely inappropriate for the receivership aspect of this case. Further, contrary to Defendant's position, staying the entirety of this matter will severely prejudice the interests of non-party investors in the Receivership Entities. Absent the Receiver's ability to identify, account for, locate, and recover Receivership Entity assets, no distributions to investors can be made.

Finally, Defendant did not challenge the appointment of the Receiver, nor the Court's Appointment Order articulating the Receiver's responsibilities. Defendant should not be allowed to seek a *de facto* reconsideration of the Appointment Order at this time.

For the foregoing reasons, the Receiver therefore respectfully requests that the Court deny Defendant's Motion.

II. ARGUMENT.

A. Defendant's Motion Is Overbroad And Unwarranted As To The Receiver.

Defendant takes no position in his Motion on whether his request for a stay is limited to the Commission's claims against him personally, or to the entirety of the above-captioned case. Indeed, Defendant's Motion remains totally silent on the issue. A subsequent communication from La Madrid's counsel likewise took no position – despite a specific request that the scope and intent of the Motion be clarified. The Receiver is therefore put in the unenviable position of having to respond to the Motion without a clear understanding of what, specifically, the Motion seeks to stay. Taken at face value, Defendant's Motion appears to request – improperly and without basis – that the Court stay the entirety of this proceeding. As such, the Motion is overbroad, and should be denied, at least as to the receivership aspects of the case.

As Defendant's own cited authority notes, the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Servs.*, 45 F.3d 322, 324 (9th Cir. 1994); *see also SEC v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980). Further, "[t]he case for staying civil proceedings is 'a far weaker one' when '[n]o indictment has been returned[, and] no Fifth Amendment privilege is [immediately] threatened.'" *FSLIC v. Molinaro*, 889 F.2d 899, 903 (quoting *Dresser Indus.*, 628 F.2d at 1376)); *see also Walsh Secs., Inc. v. Cristo Property Mgmt., Ltd.*, 7 F.Supp.2d 523, 528 (D. N.J. 1998) ("[*P*]*re* indictment requests for a stay are generally denied."). Finally, "[a] defendant [complaining of a potential risk to his right against self-incrimination] has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege." *Keating*, 45 F.3d at 326. Indeed, it is unquestionably permissible "to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates the invocation of the Fifth Amendment privilege." *Id.* (emphasis added).

Defendant's cited authority suggests that only under specific circumstances – where a criminal indictment has issued or is certain and a defendant is faced with the prospect of having to choose between invoking his right against self-incrimination and mounting an aggressive defense – should a stay even be considered. This is not the case here, and there are unquestionably other factors to consider. The bulk of Defendant's argument in the Motion rests upon the assumption that there are only two parties of relevance to this litigation – La Madrid and the Commission – and thus that a stay imposed by the Court pending the resolution of possible criminal proceedings against La Madrid would not compromise the goals of this case. This assumption is incorrect, and the standard articulated by the Ninth Circuit in *Keating* favors denying Defendant's Motion as to the receivership aspect of this case.

Specifically, where a defendant seeks a stay of a civil action pending the resolution of a related, criminal matter, on the basis that his Fifth Amendment rights may be compromised, a District Court should consider the following factors in deciding whether – and to what extent – to impose a stay: (1) the interest of the plaintiffs in proceeding expeditiously with the subject litigation and the potential prejudice to the plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose upon a defendant; (3) the convenience of the court and efficient management of its resources; (4) the interests of persons not parties to the civil action; and (5) the interest of the public. *Keating*, 45 F.3d at 324-25.

As discussed below, Defendant's Motion fails to address each of the Keating factors, and the existence of other parties in this matter, including interested third parties whose interests will necessarily be affected by a blanket stay, militates against granting Defendant's overbroad Motion.

1. A Stay Of This Proceeding Would Compromise The Receiver's Efforts And The Interests Of Investors In the Receivership Entities.

Defendant's Motion is based upon his assertion that he may face criminal charges stemming from the conduct underlying this matter, and that – as a result – he may be forced to choose between testifying in his own defense in this matter and invoking his Fifth Amendment privilege in a prospective criminal proceeding. The Motion is therefore predicated upon a double contingency, neither part of which is certain at this point. Worse, the Motion directly addresses only two of the *Keating* factors – prejudice to the Commission and the burden potentially faced by Defendant – and fails to address the remaining factors identified by the *Keating* court.

As noted above, there are more than two parties to this matter. La Madrid is one among a host of defendants and relief defendants – many of whom have assets sought to be recovered by the Receiver pursuant to the Appointment Order. As a consequence, a blanket stay of this matter would necessarily affect – indeed, as described below – actually prejudice the interest of other parties to this litigation, and would unquestionably compromise the interests of investors/creditors of the Receivership Entities.

Pursuant to Section VI of the Appointment Order, the Court has charged the Receiver with, among other things, assuming control over the Receivership Entities and their assets, performing an accounting of the assets and financial condition of the Receivership Entities[2], and investigating, locating, and recovering preserving any outstanding Receivership Entity assets. These tasks cannot be readily and indefinitely suspended without compromising the results of the Receiver's efforts. By example, the Receiver's ability to investigate, locate, recover, and preserve outstanding or unaccounted for Receivership Entity assets would necessarily be compromised by a blanket stay of this matter, actually rendering it impossible for the Receiver to pursue those efforts, and potentially putting an eventual recovery of Receivership Entity assets at risk.

Each of the Receiver's responsibilities under the Appointment Order is necessarily time-sensitive, and any delay heightens the possibility that Receivership Entity assets may be dissipated or otherwise rendered unrecoverable. This, in turn, would reduce the amount of funds available, if any, for distribution to investors in the Receivership Entities at the conclusion of the case.

B. Defendant's Motion Requests More Relief Than Is Warranted Given His Stated Concerns.

It is well recognized that a receiver is the agent only of the court appointing him; he represents the court rather than the parties. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147, 150 (4th Cir. 1944). As a result, the Receiver's responsibilities under the Appointment Order are, in a practical sense, independent of the Commission's claims against La Madrid or any criminal investigation being undertaken by the United States Attorney's Office or any other entity.

A blanket stay of these proceedings is therefore unnecessary. As noted above, staying the entire action would hinder the Receiver's ability to locate and recover critical information and Receivership Entity assets, and could provide parties in possession of such information or assets with an opportunity to hide evidence or dissipate assets. To the extent that the Court determines that La Madrid should not face a choice between testifying in his own defense in this matter and invoking his Fifth Amendment privilege in a prospective criminal proceeding, the Court need only stay the taking of contemporary, testimonial discovery from La Madrid. The Receiver's investigation – including the recovery of Receivership Entity documents and records – does not implicate Defendant's Fifth Amendment Privilege where it does not require him to provide contemporary testimony.[3]

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[2] Indeed, the Receiver's Initial Report and Petition for Further Instructions must be filed with the Court by July 30, 2008.

To the extent that Defendant's Motion purports to attempt to safeguard his right against self-incrimination, the Motion is, again, overbroad. A blanket stay is unnecessary and would be excessive, given the less-restrictive alternative of staying the taking of contemporary, testimonial discovery from La Madrid. As a result, the Receiver respectfully requests that the Court deny the Motion as overbroad, or tailor any stay so as to protect Defendant's rights while allowing the Receiver to continue with his responsibilities.

C. Defendant's Motion Represents An Untimely Motion To Reconsider The Appointment Order.

The Court entered the Appointment Order on May 16, 2008. No objections – either from La Madrid or any other party – were made. As discussed above, Section VI of the Appointment Order charges the Receiver with assuming control over the Receivership Entities and their assets, performing an accounting of the assets and financial condition of the Receivership Entities, and investigating, locating, and recovering preserving any outstanding Receivership Entity assets. These efforts were already well underway at the time Defendant filed his Motion – nearly two months after the Court entered the Appointment Order.

Given Defendant's apparent intent to trigger a blanket stay of these proceedings, including upon the receivership aspects of the case, Defendant's Motion can be accurately characterized as a *de facto* motion for reconsideration – an attempt to have the Court revisit (and indeed effectively rescind) the Appointment Order. Such an effort must not be countenanced. Reconsideration is an extraordinary remedy, to be used sparingly, and courts routinely refuse to hear argument or evidence that could have been presented at the original hearing. *Kona Enter., Inc. v. Estate of*

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[3] An individual defendant is not permitted to invoke his Fifth Amendment privilege with respect to the records of a collective entity, such as a corporation. *See In re Grand Jury Subpoena*, 383 F.3d 905, 910 n.1 (9th Cir. 2004) (citing *Wilson v. United States*, 221 U.S. 361, 380 (1911). The production of Receivership Entity documents, computers, and other materials containing historical statements therefore does not implicate Defendant's right against self-incrimination.

Bishop, 229 F.3d 887, 890 (9th Cir. 2000); *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995).

Here, Defendant knew – well before the Appointment Order was submitted to or approved by the Court – that the conduct underlying this case could be a focus for criminal proceedings as well. (*See* Declaration of Joseph Casas in Support of Motion to Stay Civil Proceedings Pending Resolution of Criminal Action ¶ 4) (Federal Bureau of Investigation, at the behest of the Assistant United States Attorney, executed search warrant in connection with ongoing criminal investigation of La Madrid.) Nonetheless, Defendant raised no Fifth Amendment (or other) concerns in connection with the appointment of the Receiver, nor did he object to the Receiver's responsibilities as identified in Section VI of the Appointment Order. The Court must not revisit the Appointment Order two months after the fact merely because Defendant has raised what amounts to a hypothetical concern over discovery.

III. CONCLUSION.

For the foregoing reasons, the Receiver respectfully requests that this Court deny Defendant's Motion, and allow the receivership aspect of this case to proceed.

Dated: July 25, 2008

By: /s/ David L. Osias
DAVID L. OSIAS
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PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 501 West Broadway, 15th Floor, San Diego, California 92101-3541.

On July 25, 2008, the foregoing document (and accompanying declarations) were served via NEF notice to the following parties who are registered ECF filers in this case:

Attorney for SEC	Peter Del Greco, Esq. John M. McCoy III, Esq. U.S. Securities and Exchange Commission 5670 Wilshire Boulevard, 11th Floor Los Angeles, CA 90036
Receiver	Mr. Stephen J. Donell Jalmar Properties, Inc. 12121 Wilshire Boulevard, Suite 301 Los Angeles, CA 90025
Attorney for Defendant Matthew La Madrid	Joseph N. Casas, Esq. Casas Law Group, P.C. 2323 Broadway, Suite 202 San Diego, CA 92102
Attorney for Palladium and Lopez	Robert J. Liskey, Esq. Tyler & Wilson 5455 Wilshire Boulevard, Suite 1925 Los Angeles, CA 90036

In addition, copies were served on the following by placing a true copy thereof in sealed envelope(s) addressed as stated below and depositing in the U.S. Mail at San Diego, California:

Anthony L. Leffert, Esq.
Robinson Waters & D'orisio
1099 18th Street #2600
Denver, CO 80202-1926

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made and that the foregoing is true and correct.

Executed on July 25, 2008, at San Diego, California.

Catherine A. Schiaffo
(Type or print name)

(Signature)